

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TUSI BROTHERS, INC.,

Plaintiff,

V.

**DAYSTAR SILLS, INC. AND
NB PARTNERS, LLC,**

Defendants.

C.A. No.: CPU4-09-008532

Date Submitted: May 13, 2011

Date Decided: June 7, 2011

Keith M. Horner, Esquire
Logan & Petrone, LLC
One Corporate Commons
100 W. Commons Blvd., Suite 300
New Castle, DE 19720
Attorney for Daystar Sills, Inc.

William J. Rhodunda, Jr., Esquire
Rhodunda & Williams LLC
1220 Market Street, Suite 710
Wilmington, DE 19801
Attorney for NB Partners, LLC

OPINION AND ORDER ON DEFENDANT’S
MOTION TO AMEND AND MOTION TO DISMISS

This Court heard oral argument on Daystar Sills, Inc.’s (hereinafter “Daystar”) Motion to Amend the Cross Claim and Motion to Dismiss Count One of Co-Defendant NB Partners, LLC’s (hereinafter “NB Partners”) Counterclaim on May 13, 2011. Following oral argument by counsel, the Court reserved decision. This is the Court’s Final Order and Decision on Daystar’s Motions.

I. Procedural Posture

The Complaint was filed by Plaintiff, Tusi Brothers, Inc. against Defendants, Daystar Sills, Inc. and NB Partners, LLC on November 5, 2009, alleging breach of a construction

contract in which Tusi Brothers, Inc. provided construction services for Daystar at NB Partners' property. Tusi Brothers, Inc. alleged that Daystar failed to comply with the terms of the contract, specifically in failing to tender payment for the services performed by Tusi Brothers, Inc. Daystar filed an Answer to the Complaint on May 19, 2010, admitting the award of a contract to Tusi Brothers, Inc. for certain phases of construction at NB Partners' property but denying that payment had not been tendered for such work.

Daystar filed a Crossclaim against NB Partners on May 26, 2010, alleging breach of contract for failure of NB Partners to tender payment for construction services provided by Daystar, unjust enrichment, *quantum meruit* and violation of 6 *Del. C. § 3501 et. seq.*

Plaintiff Tusi Brothers, Inc. and Defendant Daystar reached an agreement pursuant to mediation on August 3, 2010 which resolved the claims by Plaintiff Tusi Brothers, Inc. against Defendant Daystar.

NB Partners filed an Answer to A Motion to Dismiss Tusi Brothers, Inc.'s Complaint as well as a Counterclaim against Daystar.

Daystar filed an Answer to NB Partners' Counterclaim on November 1, 2010, admitting that Daystar performed construction services but denying the balance of the allegations and that a document dated March 20, 2008 contained all the terms and conditions of the agreement between Daystar and NB Partners.

NB Partners filed an Answer to Daystar's Crossclaim on February 10, 2011, admitting that NB Partners entered into a written agreement with Daystar and that the parties agreed to a change order for additional work to be performed. However, NB Partners denies that Daystar completed the additional work agreed to by the parties in a prompt and workmanlike manner and that payment is due to owing to Daystar. NB Partners denies the allegations asserted under

Daystar's claims of unjust enrichment, *quantum meruit* and violation of 6 *Del. C. § 3501 et seq.* and asserts that NB Partners has paid Daystar in full for the services provided ; Daystar failed to fulfill its contractual obligations by failing to complete the services in a workmanlike manner; Daystar executed a Release of Liens stating that Daystar was paid in full for the entire contracted price for work completed; and NB Partners was required to repair work performed by Daystar's failure to provide the services in a workmanlike manner, causing NB Partners to incur damages, thus if NB Partners are found to not have tendered payment in full to Daystar then NB Partners is entitled to a setoff.

A Pre-Trial Conference was held on March 22, 2011. The Court entered an Order on March 31, 2011 which dismissed Plaintiff Tusi Brothers, Inc. from the proceeding. Trial in this matter is scheduled for September 8, 2011.

II. Position of the Parties

a) Motion to Amend the Cross Claim

a. Daystar's Contentions

Cross Claim Plaintiff Daystar seeks to amend its' Cross Claim pursuant to *Court of Common Pleas Civil Rule 15*.

Daystar contends that its' Motion to Amend is timely pursuant to the Court's Scheduling Order in this matter which permits a party leave to amend its pleadings on or before July 5, 2011. Daystar specifically seeks to withdraw Count I (Breach of Contract) and Count IV (Violation of 6. *Del. C. § 3501 et seq.*) of Daystar's Cross Claim against NB Partners due to the contention that Daystar did not contract with NB Partners. Daystar asserts that although Daystar's and NB Partners' initial pleadings refer to a contractual relationship between Daystar and NB Partners based upon a written agreement, the averments are incorrect because Daystar was retained by

and executed a written contract with Route 9 Associates, LLC (hereinafter “Route 9”), not NB Partners. For these reasons, Daystar seeks to withdraw Count I and Count IV of its’ Cross Claim against NB Partners. However, Daystar asserts that Count II (Unjust Enrichment) and Count III (*Quantum Meruit*) of its’ Cross Claim will remain as they are appropriate causes of action by a Contractor (Daystar) against a property owner (NB Partners) in the absence of privity.

Daystar argues that NB Partners will not be unduly prejudiced by the Amended Cross Claim as Daystar does not assert any new claims against NB Partners.

b. NB Partners’ Contentions

NB Partners does not oppose Daystar’s Motion to Amend the Crossclaim pursuant to *Court of Common Pleas Civil Rule 15(a)*.

b) Motion to Dismiss

a. Daystar’s Contentions

Daystar argues that Count I of NB Partners’ Counterclaim must be dismissed because NB Partners fails to establish a prima facie case for breach of contract. Further, Daystar alleges that NB Partners did not contract with Daystar and NB fails to establish any damages as a result of Daystar’s alleged actions.

Daystar argues that the requisite elements for a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation; and 3) damages resulting from said breach.¹

NB Partners alleges breach of contract against Daystar for work and services that Daystar provided at Lot 3, River Road Industrial Park 2, New Castle, Delaware 19720 (hereinafter the “Project”).² NB Partners alleges that Daystar completed certain specified improvements that included construction of a building and associated parking lot pursuant to a contract dated March

¹ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. 2005).

² See Counterclaim at ¶ 3.

20, 2008.³ Daystar contends that more specifically, NB Partners claims that Daystar performed defective work at the Project parking lot which will require \$159,000 to repair alleged deficiencies.⁴

Daystar argues that Count I of NB Partners' Counterclaim must be dismissed because NB Partners did not contract with Daystar to perform work on the Project. Rather, Daystar was retained by and executed a written agreement with Route 9 for work on the Project. Daystar has submitted an abbreviated copy of the AIA contract between Daystar and Route 9 dated March 20, 2008 for work on Lot 3, incorporated as Exhibit 2.⁵

Daystar further argues that since NB Partners did not contract with Daystar, NB Partners' breach of contract claim in Count I of the Counterclaim must be dismissed.⁶

Additionally, NB Partners fails to establish any damages as a result of Daystar's alleged actions. NB Partners' claim for damages against Daystar in the amount of \$159,000 is based upon a proposal from Macadam Company, Inc. (hereinafter the "Proposal") to repair alleged deficiencies at the Project parking lot.⁷ However, the Proposal is addressed to The Commonwealth Group, not NB Partners. As such, NB Partners is not contracting to perform repair work at the Project parking lot and therefore fails to establish damages as a result of Daystar's alleged actions. Daystar argues that since NB Partners fails to establish two of the three elements required to demonstrate a prima facie case for breach of contract, the Court must dismiss Count I of NB Partners' Counterclaim against Daystar.⁸

³ See Counterclaim at ¶ 4.

⁴ See Counterclaim at ¶ 8 and Exhibit B to Counterclaim.

⁵ See Daystar's Exhibit 2. Counsel for Daystar notes that the Exhibit produced to the Court omits the related scope of work sections for the contract to reduce extraneous and superfluous documentation.

⁶ See, *Interim Healthcare*.

⁷ See Exhibit B to the Counterclaim which Counsel for Daystar incorporates as Exhibit 3.

⁸ See, *Interim Healthcare*.

Cross Claim Plaintiff Daystar requests that the Court enter an Order dismissing Count I of Cross Claim Defendant NB Partners' Counterclaim with prejudice.

b. NB Partners' Contentions

NB Partners opposes Daystar's Motion to Dismiss Count I of NB Partners' Counterclaim.

In support of the Opposition to Daystar's Motion to Dismiss, NB Partners states that Daystar was the general contractor for a construction project on behalf of NB Partners.⁹ The action began in November 2009 when Plaintiff Tusi Brothers, Inc. filed a Complaint against Daystar and NB Partners. On May 26, 2010, Daystar filed its Crossclaim against NB Partners.

NB Partners contends that the Daystar Crossclaim asserts that NB Partners and Daystar entered into a "written agreement" and agreed to a Change Order.¹⁰ Daystar seeks payment from NB Partners for the work it alleges was done properly pursuant to the terms of the agreement. NB Partners denies Daystar's allegations.

On October 10, 2010, NB Partners filed its Counterclaim against Daystar. On or about November 1, 2010, Daystar answered NB Partners' Counterclaim wherein Daystar admits that NB Partners and Daystar entered into a contract regarding the Project and the parties clarified that the March 20, 2008 document does not contain "all of the terms and conditions of the agreement between Daystar and NB Partners, LLC."¹¹

On February 11, 2011, NB Partners served Daystar with discovery requests, to which Daystar responded on April 13, 2011. Within its responses, Daystar states that it "fulfilled its contractual obligations and NB Partners received a Certificate of Occupancy for the Project."¹²

⁹ See Counterclaim ¶ 3.

¹⁰ See Crossclaim ¶¶ 3, 4 and NB's Exhibit A.

¹¹ See Daystar's Answer to NB Partners' Counterclaim ¶¶ 3 and 4.

¹² See Daystar's Answer to NB Partners' Request for Production No. 4.

Daystar further states that it completed work for NB Partners pursuant to Change Order # 3¹³ and that “additional terms and conditions are included in the subsequent change orders on the Project.”¹⁴

NB Partners contends that Daystar now seeks to dismiss NB Partners’ breach of contract claim by incorrectly asserting that a contract between NB Partners and Daystar does not exist because the written agreement that the parties relied upon is between Daystar and Route 9 Associates.

NB Partners alleges that it is an entity closely associated with Route 9 Associates and The Commonwealth Group, with substantially the same partners and/or officers. Route 9 Associates sold the property to NB Partners on February 8, 2008. NB Partners remains the owner of the land where the Project was constructed, and NB Partners was the entity tasked with ensuring the Project’s completion. While Route 9 Associates was the original named party in the contract, the contract was novated to NB Partners, creating a contractual obligation between Daystar and NB Partners.¹⁵

NB Partners asserts that a party claiming novation must show: “(1) a valid pre-existing obligation; (2) a valid new contract; (3) extinction of the old contract; and (4) the consent of all parties to the novation transaction.”¹⁶ Further, according to NB Partners, consent may be implied by the actions so long as the novation is clearly intended.¹⁷

NB Partners argues that the four elements required for a novation have been met.

¹³ See Daystar’s Answer to NB Partners’ Interrogatories Nos. 7 and 8.

¹⁴ See Daystar’s Answer to NB Partners’ Request for Production No. 6 included as NB Partners’ Exhibit A.

¹⁵ See NB Partners’ Exhibit B (Affidavit).

¹⁶ *The Reserves Dev. Corp. v. Esham*, 2009 WL 3765497 at *9 (Del. Super. Ct. Nov. 10, 2009); *Caldera Properties-Lewes/Rehoboth VII, LLC v. The Ridings Dev.*, 2009 WL 2231716 at *26 (Del. Super. Ct. May 29, 2009).

¹⁷ *Id.*

First, there is no dispute that Daystar entered into an agreement with Route 9 Associates to be the general contractor for the Project, creating a valid pre-existing obligation.

Second, there is no dispute that NB Partners entered into a valid new contract with Daystar when Daystar began to perform work on the Project for NB Partners. In response to Daystar's work, NB Partners paid Daystar for all services performed.¹⁸

Third, from the beginning, both parties were aware that NB Partners would be responsible for payment to Daystar and the NB Partners remained in control of the Project. Most notably, aside from actual payments to Daystar, Daystar executed the Certificate of Payment Full Waiver and Release of Liens specifically acknowledging receipt of payment from NB Partners for \$274,821.66, indemnifying its "successors and assigns."

Lastly, NB alleges that the parties believed that NB Partners was the contracting party, and acted accordingly. Until now, Daystar's pleadings reflected that belief. Daystar has not received discovery from NB Partners as of yet, and has relied upon its beliefs and the documents in its possession to make claims against NB Partners. NB Partners argues further that the parties knowingly assented to the novation, and only now that a contract claim against Daystar has been asserted is Daystar claiming, through a hyper-technical argument, that a contract does not exist.

NB Partners argues that at this stage of the litigation, a genuine material issue of fact exists as to whether a novation occurred, and it is premature to dismiss any claims.¹⁹

NB Partners further argues that Daystar incorrectly argues that NB Partners' claim for breach of contract should be dismissed for NB Partners' failure to establish damages related to Daystar's actions. According to NB Partners, Daystar's position rests upon NB Partners' reliance upon the Macadam Company proposal which is addressed to The Commonwealth

¹⁸ See NB Partners' Exhibit C.

¹⁹ See *Esham*, 2009 WL 3765497 at *10 ("The record raises a genuine issue as to whether the parties' conduct is consistent with an implied novation Such questions must be left for the trier of fact.").

Group, the property manager for the subject property and Daystar relies upon a 57-page opinion that is not on point, *Interim Healthcare, Inc. v. Spherion Corp.*, which was issued after a bench trial.

NB Partners alleges that in this case, Daystar's argument is premature. The issue of damages is a question of fact to be determined at trial, as it was in *Interim Healthcare*. Admittedly, the Macadam proposal is addressed to The Commonwealth Group via Timothy L. Jones, Esquire, but that does not mean that testimony, or other documents, would not establish NB Partners' damages. As indicated, The Commonwealth Group is the property manager for the subject property and is an entity associated with NB Partners, and Timothy L. Jones is a member of both entities.²⁰

NB Partners asserts that when ruling upon a motion to dismiss, the Court must accept all of the well pled allegations as true, construing them in a light most favorable to the plaintiff, but shall not accept conclusory allegations alone as the basis for a cognizable claim.²¹ NB Partners argues that in viewing all facts in favor of NB Partners, there exists a genuine issue of material fact and dismissal is inappropriate.

NB Partners requests that the Court enter an Order denying Daystar's Motion to Dismiss and awarding Court costs and attorney fees spent in connection with the Motion.

III. Standard of Review

The issue of the standard of the review to be applied to the instant dispute must be resolved. On April 21, 2011, Defendant/Counterclaim Defendant/Crossclaim Plaintiff Daystar filed a Motion to Dismiss, and on May 6, 2011, Defendant/Counterclaim Plaintiff/Crossclaim Defendant filed a response.

²⁰ See NB Partners' Exhibit B (Affidavit).

²¹ See *Great Am. Assurance Co. v. Fisher Controls Internat'l, Inc.*, 2003 WL 21901094 (Del. Super. Ct. Aug. 4, 2003).

It is within the Court's discretion to *sua sponte* convert a motion to dismiss into a motion for summary judgment under certain circumstances.²² The materials must require conversion, the parties must receive adequate notice of the conversion, and if adequate notice is not given, then the conversion must cause only harmless error.²³ *Court of Common Pleas Civil Rule 12(b)* control the analysis and provides:

“If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”²⁴

In the instant Motion to Dismiss, new factual and legal information and argument is included, thus the parties have presented averments and additional evidence beyond that presented in the pleadings. Therefore, conversion is appropriate.

Proper notice of conversion was given. “Adequate notice allows parties an opportunity to submit evidentiary materials to support or oppose summary judgment and protects opposing parties from what, in effect, is ‘summary judgment by ambush.’”²⁵ “The parties must have a reasonable opportunity to present all facts pertinent to the motion.”²⁶ Further, when a court exercises its’ conversion power, it should do so “with great caution and attention to the parties’ procedural rights.”²⁷

²² *Appriva Shareholder Litigation Co. v. EV3, Inc.*, 937 A.2d 1275, 1286 (Del. 2007); *Ramirez v. Murdick*, 948 A.2d 395 (Del. 2008).

²³ *Appriva*, 937 A.2d at 1286.

²⁴ *Court of Common Pleas Civil Rule 12(b)*.

²⁵ *Appriva*, 937 A.2d at 1286; *Geco Corp. v. H.D. Smith Wholesale Drug Co.*, 2006 WL 3359652 at *2 (D.N.J. Nov. 17, 2006) citing *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 760 (D.N.J. 2002).

²⁶ *Appriva*, 937 A.2d at 1287 citing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986).

²⁷ *Appriva*, 937 A.2d at 1288, citing 5C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 136 at 149 (3d ed. 2004).

In the action before the Court, there was no “summary judgment by ambush.” The parties briefed the Motion to Dismiss and attached supporting documentation to such. The parties argued the issues before the Court as well. Both parties had notice because they both had a full and reasonable opportunity to present all the facts pertinent to the Motion.

Court of Common Pleas Civil Rule 56(c) governs motions for summary judgment and provides:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁸

In order to prevail on a Motion for Summary Judgment, the moving party must prove that there are no genuine issues as to any material fact and that it is entitled to judgment as a matter of law.²⁹ In reviewing the record, the Court must review all facts and all reasonable inferences in the light most favorable to the non-moving party.³⁰ If a Motion for Summary Judgment is properly supported, the burden shifts to the nonmoving party to demonstrate that there are material issues of fact. The Motion for Summary Judgment will be denied if the Court finds any genuine issues of material fact.³¹

IV. Opinion and Order

Regarding Daystar’s Motion to Dismiss which is in essence a Motion for Summary Judgment, in deciding whether Daystar is entitled to the grant of said Motion, the Court must determine that there are no genuine issues as to any material fact in the record.³²

²⁸ *Court of Common Pleas Civil Rule 56(c)*.

²⁹ *Browning-Ferris, Inc. v. Rockford Enterprises, Inc.*, 642 A.2d 820, 823 (Del. Super. Ct. 1993).

³⁰ *Stein v. Griffith*, 2002 WL 32072578 at *1 (Del. Com. Pl. Dec. 12, 2002).

³¹ *Moore v. Anesthesia Services*, 2008 WL 484452 at * 4 (Del. Super. Ct. Feb. 15, 2008).

³² See *Court of Common Pleas Civil Rule 56(e)*.

Although it is clear to the Court that payment rendered to Daystar in the amount of \$274,821.66 was in the form of a check from The Commonwealth Group, there are, in fact, genuine issues of material fact in the record as to which entity contracted with Daystar. David Sills, owner of Daystar, signed an affidavit entitled “Certification of Payment Full Waiver and Release of Liens”³³ in which he swore that he received payment from NB Partners in the total amount of \$274,821.66. Further, Daystar’s initial pleadings in this matter refer to a contractual relationship between Daystar and NB Partners. In sum, Daystar acknowledges or at the very least, references that NB Partners is the entity to which it is dealing once construction commenced and Daystar also acknowledges receipt of payment from NB Partners. A genuine issue of material fact further exists in whether a novation occurred, specifically whether NB Partners stood in the shoes of Route 9 Associates after the contract was executed and if so, whether Daystar impliedly consented to such novation by virtue of the Change Order executed between Daystar and NB Partners.

Assuming *arguendo*, even if the Court were to construe Daystar’s Motion simply as a Motion to Dismiss, the result would still be the same. In considering a motion to dismiss, the Court would determine whether under any reasonable set of conceivable facts, whether NB Partners would be entitled to relief. In this instance, since genuine issues of material fact exist it is possible that NB Partners may prevail upon the Counterclaim. Thus, dismissal of NB Partners’ claim for breach of contract is inappropriate at this juncture.

Further, Daystar moves this Court to dismiss Count I of NB Partners’ Counterclaim based upon Daystar’s position that NB Partners will not be able to produce sufficient evidence to meet the burden of proof. Daystar argues that NB Partners cannot prove one essential element of its claim and as such, all other elements of the claim are rendered immaterial.

³³ See NB Partners’ Exhibit C.

Specifically, Daystar alleges that NB Partners cannot prove damages as a result of the alleged breach of contract set forth in NB Partners' Counterclaim.

The Court finds that the proper time and place regarding whether NB Partners' will be able to carry its burden of proof is at trial. Thus, because Summary Judgment would be inappropriate at this juncture as well as based upon the genuine issues of material fact that have been raised, Daystar's Motion to Dismiss is hereby denied. It is clear to this Court that genuine issues of material fact exist as to both Daystar and NB Partners.

Daystar's Motion to Amend the Crossclaim is hereby granted as counsel for NB Partners does not oppose such Motion.

The Court hereby DENIES Daystar's Motion to Dismiss and GRANTS Daystar's Motion to Amend the Crossclaim. Each party shall bear their own costs.

IT IS SO ORDERED this 7th day of June 2011.

John K. Welch, Judge

/jb

cc: Ms. Tamu White, Civil Division Case Manager